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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983
No. 83-415

GEORGE E. HILLER,
Petitioner,

vs.

STATE OF ALASKA,
Respondent.

RESPONSE OF THE STATE OF ALASKA TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF ALASKA, THIRD JUDICIAL DISTRICT

NORMAN C. GORSUCH
ATTORNEY GENERAL OF THE
STATE OF ALASKA

By: DAVID MANNHEIMER
Assistant Attorney General

Office of Special Prosecutions and Appeals
1031 West Fourth Ave.,
Suite 318
Anchorage, Alaska 99501
(907) 279-7424

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JURISDICTION

Hiller has invoked this Court's jurisdiction under 28 U.S.C. §1257(3). While Hiller satisfies the jurisdictional requirement of having received a final judgement of the highest state court in which a decision could be had, the State believes that Hiller has failed to demonstrate either standing or ripeness of the controversy. These matters will be presented in the Argument section of the State's response.

Note on the structure of the Alaska courts:

Hiller was tried in the "district court", a court whose criminal jurisdiction is limited to misdemeanors. A defendant convicted in district court has an appeal as a matter of right, but such a defendant is given the option of pursuing this appeal in either the "superior court" (Alaska's trial court of general jurisdiction) or the "court of appeals" (Alaska's intermediate appellate court for criminal cases). Alaska Stat-

utes 22.07.020(c) and (d), and 22.15.240(b).

Hiller chose to appeal to the superior court; once Hiller made this choice, further review by either the court of appeals or the Alaska supreme court was discretionary.

The superior court affirmed Hiller's conviction. The court of appeals, and later the Alaska supreme court, declined to review the superior court's decision. Thus, the superior court's affirmance of Hiller's conviction is the final judgement necessary to satisfy 28 U.S.C. §1257.

QUESTIONS PRESENTED

1. Hiller is asking this Court to rule upon the issue of whether the exclusionary rule should be applied as a remedy for violations of the "Posse Comitatus Act", 18 U.S.C. §1350.

The State of Alaska believes the question presented more properly is: Should the Court take up this issue in a case where the state courts have ruled that the Posse Comitatus Act was in fact not violated, and where the Alaska supreme court has expressly left open the issue of whether the remedy for a Posse Comitatus violation should be suppression of evidence?

2. Hiller alleges that he was stopped by air force security personnel as he attempted to drive his vehicle onto Elmendorf Air Force Base while apparently intoxicated, and that he was then questioned and given "field sobriety tests" (tests of physical coordination and mental dexterity) by the air force security police before being turned over to the civilian authorities.

Even in the light most favorable to Hiller, do Hiller's allegations establish a violation of the Posse Comitatus Act?

3. Assuming that Hiller has a colorable claim that the Act was violated in his case: to the extent that Hiller's ability to have his Posse Comitatus claim heard in the Alaska courts was hampered by a change in the Alaska law on the subject of Posse Comitatus that occurred while Hiller's case was on appeal, should Hiller be raising this problem for the first time in a petition for certiorari to this Court or should he first pursue the remedy available to him under state law?

STATUTORY PROVISIONS INVOLVED

The Posse Comitatus Act, 18 U.S.C. §1350, provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

Alaska Criminal Rule 35(c)(7) provides:

> Post Conviction Procedure -- Scope. Any person who has been convicted of, or sentenced for, a crime and who claims:
>
> . . .
>
> (7) that there has been a significant change in law, whether substantive or procedural, applied in the process leading to applicant's conviction or sentence, when sufficient reasons exist to allow retroactive application of the changed legal standards;
>
> may institute a proceeding under this rule to secure relief.

STATEMENT OF THE CASE

Elmendorf Air Force Base directly borders the city of Anchorage, Alaska. On December 21, 1981, George Hiller was driving his car toward the entrance to Elmendorf AFB. As Hiller's car neared the entrance to the base, the sentry on duty at the "gate shack" (the sentry box at the entrance to the base) saw Hiller's car veer toward the right edge of the road, then swerve completely across the on-coming lane and almost crash into the snow berm on the other side of the road. Hiller's car then came to a stop just outside the entrance to the base.

The sentry went up to Hiller's car and asked Hiller to step outside his vehicle; Hiller had difficulty standing and walking back to the gate shack. Inside the gate shack, Hiller stumbled repeatedly against the wall and had difficulty maintaining his balance; his speech was slurred, and he smelled strongly of liquor.

The sentry called two Air Force

military policemen to take charge of Hiller. These two military policemen asked Hiller to perform field sobriety tests, and questioned him about his driving and his drinking. At the end of this interview, the air force police took Hiller to the Anchorage courthouse and turned him over to civilian authorities.

Hiller was charged with the misdemeanor of operating a motor vehicle while intoxicated, under Alaska Statute 28.35.030. Trial by jury was scheduled in the district court in Anchorage.

Before trial, Hiller moved to have the testimony of the three airmen (the sentry and the two military policemen) suppressed on the ground that the Posse Comitatus Act had been violated when the Air Force personnel detained and then questioned him.

However, the Alaska court of appeals had recently (in fact, 10 days before Hiller's arrest) issued its opinion in the case of Harker v State, 637 P.2d 716 (Alaska App. 1981). In Harker, the court of appeals ruled that even in cases where the Posse Comitatus

Act had been violated the remedy was not suppression of the evidence.

Thus, the prosecutor responded to Hiller's suppression motion by first arguing that the Act had not been violated, but then by pointing out that the issue of whether the Act had been violated was really irrelevant: under controlling Alaska law, even if the Act had been violated Hiller would still not be entitled to suppression of the air force officers' testimony. The motion judge denied Hiller's motion.

On the day of trial, after the jury had been selected but before the testimony began, Hiller renewed his Posse Comitatus claim -- with a new twist: instead of asking for suppression of the airmen's testimony, Hiller's attorney asked the trial judge to warn the three air force officers who had come to testify of their Fifth Amendment privilege, of the fact that the Posse Comitatus Act had apparently been violated, and of the fact that the airmen might be prosecuted based on their testimony.

In response to this renewed

motion, the trial judge (not the same judge as before) ruled that even if Hiller's offer of proof as to the facts of the case were accepted in all details, there still had been no violation of the Posse Comitatus Act.

The trial judge ruled that, in order for the Act to have been violated, three conditions had to have been met: (1) the involvement of the airmen must have arisen at the instigation of civilian authorities, (2) the actions of the airmen must have been aimed primarily at accomplishing civil law enforcement goals rather than military purposes, and (3) the actions of the airmen must have gone beyond merely arresting a person who broke the law in their presence (since any citizen would be entitled to do as much).

Under Hiller's offer of proof, the judge conceded, the airmen had performed acts in excess of merely arresting a suspected lawbreaker; but the judge found that, even taking Hiller's offer of proof as true, Hiller had failed to establish conditions (1) and (2) --

that is, he had failed to prove either that the actions of the air force security police had been instigated by the civil authorities or that their actions had been aimed primarily at a civil, rather than a military, purpose.

Based on this ruling, the trial judge refused to instruct the air force witnesses that they should be aware of possible Fifth Amendment problems if they testified.

The State relied upon the air force officers' testimony at trial, and the jury convicted Hiller. Hiller appealed his conviction to the superior court on the ground that the suppression issue had been wrongly decided.

The superior court affirmed Hiller's conviction by order dated 9 February 1983. (Appendix to Hiller's petition, page 1) The superior court's ruling on appeal does not mention Harker at all; instead, the court's order states that the decision on appeal was based on the legal theory that a trial court's findings of fact should not be disturbed

unless shown to be clearly erroneous.

Hiller then brought a "petition for hearing" to the court of appeals, asking that court to exercise its power of discretionary review under Alaska Appellate Rule 302(b). On March 30th, the court of appeals declined to take Hiller's case, whereupon Hiller brought a petition for hearing to the Alaska supreme court.

Several months earlier, the state supreme court had accepted the Harker case for hearing; and on May 6th, while Hiller's petition for hearing was pending, the supreme court issued a new, superseding opinion in Harker v State, 663 P.2d 932 (Alaska 1983), which completely changed Alaska law on the relationship between the Posse Comitatus Act and the exclusionary rule.

As already noted, the court of appeals had decided Harker I by ruling that a defendant would not be entitled to suppression of the evidence against him even if the Posse Comitatus Act had been violated. In Harker II, the supreme court reversed this holding of the court

of appeals, and instead expressly declined to decide the issue of what the proper legal remedy should be for a violation of the Act. The supreme court was able to do this because it found that, on the facts in Harker, the Act had clearly not been violated.

One month after it issued its superseding opinion in Harker II, the supreme court denied Hiller's petition for hearing.

Hiller now petitions this Court to issue a writ of certiorari.

REASONS FOR DENYING THE WRIT

Hiller, in his petition to the Court, gives two potential reasons for seeking this Court's intervention in his case: first, he wants a ruling on the applicability of the exclusionary rule to cases in which the Posse Comitatus Act has been violated; and second, he claims that his right to a fair appeal process has been violated because the Alaska courts never held a hearing or issued a ruling on the question of whether the Act had been violated or not. (See Hiller's Brief, pages 10-11)

I. THE TRIAL COURT RULED THAT THE POSSE COMITATUS ACT HAD NOT BEEN VIOLATED; HILLER DOES NOT CHALLENGE THIS RULING ON APPEAL, AND THUS HE HAS NO STANDING IN THIS COURT.

It is true that Hiller's suppression motion was denied before trial without an express ruling from the motion judge as to whether or not the Posse Comitatus Act had been violated --

since, under Harker I, Hiller was not entitled to suppression of the evidence anyway.

However, when Hiller tried to stifle the airmen's testimony on the first day of his trial (by asking the judge to deliver explicit Fifth Amendment warnings to the State's witnesses), the trial judge expressly held that Hiller had failed to establish a violation of the Posse Comitatus Act even if his offer of proof were accepted as true. And from the wording of the order issued by the superior court on appeal, it appears that the superior court affirmed Hiller's conviction based on the trial court's finding that no violation had been shown: the superior court's order does not mention Harker, and instead quotes law to the effect that factual findings of the lower court should be affirmed unless shown to be clearly erronecus.

Thus, it is the State of Alaska's position that Hiller indeed received a ruling on the factual issue of whether the Posse Comitatus Act had been violated -- and that ruling was against

him.

Hiller's petition to this Court overlooks this ruling, and instead concentrates solely upon the policy issue of whether violations of the Act should lead to suppression of evidence in ensuing criminal trials. But because of the trial judge's ruling that the Act had not been violated in Hiller's case, Hiller lacks standing to raise the issue of what the proper remedy should be for violations of the Act.

II. EVEN IF THE TRIAL JUDGE'S RULING ON THE FIRST DAY OF TRIAL IS IGNORED, THE EXCLUSIONARY RULE ISSUE IN THIS CASE IS STILL NOT RIPE; NOR HAS HILLER DEMONSTRATED STANDING

Even if the factual ruling at trial is ignored and this case is considered solely upon Hiller's characterization of the underlying facts, Hiller still fails to establish ripeness of the controversy or standing before this Court.

Hiller describes his case as one in which the Alaska courts have

denied him a hearing on the merits of the alleged Posse Comitatus violation, and instead have denied his suppression motion based on the now superseded holding in Harker I that the exclusionary rule would never apply to violations of the Act.

But even Hiller must admit that the Alaska supreme court's refusal to review his case could not have been based on such a rationale -- since, only four weeks before, they had overturned the court of appeals's decision in Harker I and had expressly left undecided the question of whether suppression of evidence would be a proper remedy for a violation of the Posse Comitatus Act.

(The State of Alaska believes that the supreme court's act of simply denying Hiller's petition for hearing, rather than remanding the case for reconsideration in light of Harker II, shows that the court agreed that the facts of the case did not demonstrate any likelihood that the Posse Comitatus Act had been violated.)

But assuming, for the sake of argument, that the trial court's decision to deny Hiller's suppression motion, the superior court's affirmance of his conviction on appeal, and the court of appeals's refusal to review the case were all based on the now-discredited decision in Harker I, and that the Alaska supreme court's decision not to review his case was based only on considerations of the court's workload, Hiller still should not be before this Court now:

Because the controlling Alaska law on the Posse Comitatus question changed after Hiller had exhausted his appeal to the superior court and his petition to the court of appeals, he is in the unusual position of having a "final judgement" even though no Alaska court has ever had to consider or rule upon the question of whether the Posse Comitatus Act was actually violated in his case. At the time Hiller was pursuing his appeal in state court, the applicable law (under the court of appeals's decision in Harker I) was that Hiller would not be entitled to suppres-

sion of the airmen's testimony even if the Act had been violated. Thus, whether the Act had been violated was irrelevant to deciding Hiller's suppression motion, and both the trial court and (on appeal) the superior court would have been able to deny Hiller's suppression motion without ever addressing this issue.

Now, the Alaska supreme court in Harker II has expressly re-opened (and left unresolved) the issue of whether the exclusionary rule should apply to violations of the Posse Comitatus Act. To the extent that Hiller's suppression motion was decided on the basis of Harker I, that legal basis had been undercut.

Thus under Hiller's view of the case he has had a final judgement entered against him, but there still has been no hearing or ruling on whether the Posse Comitatus Act was violated, nor is there now any firm decision by an Alaska court as to whether the proper remedy for such a violation (assuming one were proved) should be invocation of the exclusionary rule.

This being so, then even under

Hiller's characterization of the case he has failed to present a ripe controversy to this Court. There remains an unadjudicated factual issue -- whether the actions of the airmen in Hiller's case violated the Posse Comitatus Act. In addition, because of the Alaska supreme court's decision in Harker II, the further issue that Hiller wants this Court to consider -- the applicability of the exclusionary rule to violations of the Act -- has not been adjudicated against Hiller by the Alaska courts; rather, the Alaska supreme court has expressly left that issue open, awaiting the arrival of a proper case presenting the issue.

Hiller's case is simply not ripe for intervention by this Court. See Abbott Laboratories v Gardner, 387 U.S. 136 at 148-49 (1967).

A related point is that Hiller cannot demonstrate standing to raise the exclusionary rule issue, since -- under his version of the facts -- there has never been an evidentiary hearing nor a court ruling on the issue of whether the

Posse Comitatus Act was violated in his case. A finding that Hiller was in fact injured by a violation of the Act is a prerequisite to his ability to argue that the evidence against him should have been suppressed; thus, he has no standing before this Court: Doremus v Board of Education, 342 U.S. 429 (1952).

III. EVEN TAKING HILLER'S ALLEGATIONS IN THE LIGHT MOST FAVORABLE TO HIM, THE POSSE COMITATUS ACT WAS NOT VIOLATED IN HIS CASE.

The fact situation in Hiller's case -- even under his statement of the facts (see pages 1-3 of Hiller's petition to this Court) -- was that Hiller was driving up to the entrance to a military base in an erratic manner; the sentry stopped Hiller and asked him to get out of his vehicle. When the sentry found that Hiller could barely stand, had difficulty speaking clearly, and smelled of liquor, he summoned two air force policemen who questioned Hiller and had him perform field sobriety tests. Satisfied that Hiller was under the

influence of intoxicating liquor, the air force police turned Hiller over to the civilian authorities. As Hiller asserts (page 3 of his petition), it was not until this time that "civilian authorities had any contact whatsoever with this case".

It is precisely for this reason that the Posse Comitatus Act was not violated in Hiller's case. The air force personnel acted for a proper military purpose -- to prevent an apparently drunk driver from entering the air force base, and to ascertain whether he was in fact intoxicated or was rather in need of medical care, or perhaps both. After finding out that Hiller was very intoxicated but needed no immediate medical attention, the air force police turned Hiller over to the civilian authorities who had jurisdiction over Hiller's offense.

The following discussion is derived from the Alaska supreme court's opinion in Jackson v State, 572 P.2d 87 (Alaska 1977), esp. at pages 89-91:

The Posse Comitatus Act is only

implicated when civilian authorities seek to use military personnel to aid in civilian law enforcement. At common law, the "posse comitatus" referred to the summons issued by a sheriff to all adult males of the county to aid him in keeping the peace or pursuing law breakers; the populace was obliged to obey such a summons or face legal penalties. The Posse Comitatus Act was passed to prevent civilian officials (United States marshalls or others) from using this common law power of posse comitatus to summon the aid of federal troops to keep order and police elections in the South during Reconstruction. And it is this idea of the civilian summoning of military force that remains at the core of the Posse Comitatus Act today.

Where, as in Hiller's case, there has been no request by civilian authorities for military aid, nor any pre-arranged plan for military and civilian authorities to work in concert on matters of civilian law enforcement, the Posse Comitatus Act is not violated. Hiller's detention and questioning arose

from his attempt to drive onto Elmendorf AFB in an apparently drunken condition; this was a matter that the air force personnel were clearly entitled to investigate and prevent, since it involved the safety of the population of the base. Hiller's activities also happened to constitute an offense under the laws of Alaska, so, after assuring themselves that Hiller was indeed drunk, the air force police turned Hiller over to the civilian authorities who had the power to detain and prosecute Hiller for that offense.

These actions do not constitute a violation of the Posse Comitatus Act.

IV. HILLER SHOULD PURSUE HIS REMEDY AT STATE LAW BEFORE PETITIONING THIS COURT.

Leaving all of the foregoing aside, it appears that the real complaint Hiller makes in his petition is that he has never been given a meaningful opportunity to litigate the question of whether the Act was violated in his case.

As the State argued in the section I of this response, Hiller did get a meaningful opportunity to make a complete offer of proof on this issue, and -- based on that offer of proof -- he received a ruling (adverse) on the factual issue of whether the Act was violated.

But even under Hiller's construction of the proceedings below, his predicament arises from a change in the applicable Alaska law which occurred while he was exhausting his appellate remedies in the Alaska courts. According to Hiller, his suppression motion was denied because Alaska law at that time (under Harker I) would not grant him the remedy of suppression even if the Posse Comitatus Act had been violated; he asserts that his appeal to the superior court was decided against him on the same grounds, and that the court of appeals's refusal to review his case was ostensibly based on the same reason.

Then the Alaska supreme court changed the law, overruling Harker I's holding that the exclusionary rule would

not apply to violations of the Posse Comitatus Act. Instead, under the supreme court's decision in Harker II, this issue is expressly left open again. The problem confronting Hiller (under his view of the case) is that Alaska law now says he was entitled to a hearing and a ruling on the issue of whether the actions of the airmen in his case violated the Posse Comitatus Act, but his channels of direct appeal have been exhausted.

This result, however, has not stemmed from the malice of the Alaska courts, nor has it arisen from any failure of the Alaska courts handling his case to grant Hiller his procedural rights: each court (district, superior, court of appeals) was simply following the applicable law at the time on the Posse Comitatus issue -- and then the state supreme court changed the applicable law.

To the extent that this turn of events raises a due process problem, Alaska law provides Hiller with a remedy. Under Alaska Criminal Rule 35(c)(7),

Hiller may file an action to have his conviction re-opened on the ground "that there has been a significant change in law, whether substantive or procedural, applied in the process leading to [his] conviction ..., when sufficient reasons exist to allow retroactive application of the changed legal standards".

Without pre-judging the merits of such an action -- were one to be instituted by Hiller -- it certainly seems more appropriate for Hiller to raise his grievance under this procedure allowed by state law rather than raise it for the first time in a petition for writ of certiorari.

CONCLUSION

The State of Alaska believes that the facts asserted by Hiller don't give rise to any possible violation of the Posse Comitatus Act, and that the trial judge so found.

But even if Hiller did have a colorable claim, he should not be asking this Court to issue a writ of certiorari in this case: even under Hiller's view of the case, no hearing on the Posse Comitatus issue was held, no ruling was rendered on this issue, and the Alaska supreme court has expressly left undecided the question of whether the exclusionary rule should apply to violations of the Posse Comitatus Act. The controversy is simply not ripe.

To the extent that Hiller has been frustrated in his attempts to have his claim heard by the Alaska supreme court's new ruling in this area while Hiller was still pursuing the appeal process, a remedy is available to Hiller under state law and Hiller should pursue this remedy before invoking the discretionary jurisdiction of this Court.

Respectfully submitted this 12th day of November, 1983.

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: David Mannheimer
David Mannheimer
Assistant Attorney General